IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1492 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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MANJI BIJAL KOLI - Appellant
Versus
STATE OF GUJARAT - Respondent

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Appearance :
MS REKHA H KAPADIA for the Appellant.
MR KP RAVAL, ADDITIONAL PUBLIC PROSECUTOR for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 09/10/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal, filed under Section 374 (2) of the Code of Criminal Procedure, 1973 ("the Code", for short), is directed against the judgment and order dated 31-12-2004 passed by the learned Joint District and Additional Sessions Judge, 3rd Fast Track Court, Morbi in Sessions Case No. 26 of 1991, by which the learned Judge imposed on the appellant, sentence of rigorous imprisonment for life and fine of Rs.25,000/- (Rupees Twenty Five Thousand Only) for the offence punishable under Section 302 of the Indian Penal Code, 1860 ("IPC", for short), rigorous imprisonment of 1 year and fine of Rs.1,000/- (Rupees One Thousand Only), in default, rigorous imprisonment for 3 months for the offence under Section 504 of the IPC; and rigorous imprisonment for 5 years and fine of Rs. 5,000/-, in default, rigorous imprisonment for 1 year for the offence under Section 25 (1) (a) of the Arms Act, 1959. The learned Judge ordered that the fine to the tune of Rs.25,000/- (Rupees Twenty Five Thousand Only) should be paid as compensation to the kith and kin of the deceased. The learned Judge also ordered that the sentences imposed on the appellant shall run concurrently.

2. The short facts giving rise to the present appeal are as under:-

The incident in question took place on 28-02-1991 between 11.00 PM and 11.45 PM. The deceased

and other persons went to the village situated in the sim of Anandpar for the purpose of grazing the buffaloes. One person named Abhal was thirsty and therefore, he went to the field of the accused to drink water. The deceased and the accused started quarrel on the flimsy ground of grazing buffaloes in the field. The accused, who was armed with rifle, fired bullet in the chest of the deceased, who immediately succumbed to the injuries. The complaint was given in Taluka Police Station of Tankara for the offences punishable under Sections 302 and 504 IPC as well as under Section 25 (1) (a) of the Arms Act against the accused.

2. The investigation was carried out and after completing the investigation, the charge-sheet was filed in the Court of learned Judicial Magistrate (First Class), Morbi. As the case was exclusively triable by the Sessions Court, the same was made over for trial to the Sessions Court under Section 209 of the Code on 06-06-1991. The charge against the accused was framed and he pleaded not guilty to the charge levelled against him. Thereafter, the matter was set down for full-fledged trial before the learned Judge.

3. The prosecution has examined the following witnesses in order to prove the involvement of the accused in the commission of offence. They are as under:-

(i) PW-1 Kanabhai Harbham Charna as the complainant, at Exh. 4;

(ii) PW-2 Dr. Dharmeshbhai Harsukhlal Shah, at Exh. 5;

(iii) PW-3 Witness Salimbhai Ahmedbhai Jenaj, at Exh. 15;

(iv) PW-4 Witness Todiabhai Khimabhai Charna, at Exh. 16;

(v) PW-5 Panch Naranbhai Laghabhai Dodiya, at Exh. 21;

(vi) PW-6 Witness Mavjibhai Becharbhai Rajput, at Exh. 25; and,

(vii) PW-7 Witness Bachubhai Jivbhai Ninama, at Exh. 26.

4. The prosecution has placed reliance on the following documentary evidence:-

(i) OPD case-papers of Abhal Khimabhai *vide* Exh. 6;

(ii) Note sent for performing post-mortem *vide* Exh. 7;

(iii) Post-mortem form *vide* Exh. 8;

(iv) X-ray Report *vide* Exh. 9;

(v) Post-mortem notes *vide* Exh. 10;

(vi) Application given to the police for sending

muddamal to FSL *vide* Exh. 11;

(vii) *Yadi* with regard to the sample of seal and sample of blood *vide* Exhs. 12-14;

(viii) Map of the place of the incident *vide* Exh. 18;

(ix) Inquest *panchnama vide* Exh. 19;

(x) *Panchnama* of the place of the incident *vide* Exh. 22;

(xi) Arrest *panchnama* of the accused *vide* Exh. 23;

(xii) Discovery *panchnama vide* Exh. 24;

(xiii) *Panchnama* with regard to the seizure of the clothes *vide* Exh. 28;

(xiv) Letter written for examination of *muddamal* articles *vide* Exh. 29;

(xv) Report of the FSL *vide* Exh. 30;

(xvi) Letter written for examination of *muddamal* articles *vide* Exh. 31;

(xvii) Report of FSL *vide* Exh. 32;

(xviii) Note for sending *muddamal* to FSL *vide* Exh. 33;

(xix) Letter written to the FSL *vide* Exh. 35;

(xx) Complaint *vide* Exh. 27; and

(xxi) Report of the Biological Section *vide* Exh. 36, etc.

5. At the conclusion of the trial, further

statement of the accused was recorded under Section 313 of the Code and he was informed about the incriminating circumstances against him.

6. The learned Judge, after going through the entire deposition and documentary evidence, held that the prosecution has proved beyond reasonable doubt that the death of Abhal Khima was caused in an unnatural circumstance and it was a homicidal death. The accused, who had a quarrel with the deceased, at the time of grazing the buffaloes in the field caused the death of the deceased by firing in his chest. Thus, he has committed the offence punishable under Section 302 of the IPC. As per the deposition adduced by the prosecution, a quarrel ensued between the deceased of Abhal Khima and the accused. The accused, who was armed with rifle, opened fire and caused the death of Abhal Khima. Before resorting to firing, he also abused the deceased Abhal Khima and thereby, he had committed the offence punishable under Section 504 of the IPC. The complainant PW-1 Kanabhai Harbham Charna is examined *vide* Exh. 4. He is the sole eye-witness who had seen the incident and the deposition adduced by him, according to the learned Judge, inspires confidence of the Court and, therefore, the same cannot be discarded. It is further held by the learned Judge that conviction can solely be based on the deposition adduced by the complainant and no corroboration is required in the matter. The learned Judge held that the prosecution has in a conclusive manner established the

involvement of the accused in the commission of offence by adducing documentary evidence as well as medical evidence. Thus, the learned Judge, at the conclusion of the trial, held that the prosecution, on the strength of the oral deposition, proved the involvement of the accused in the commission of offence. As the entire link connecting the accused with the commission of offence has been duly proved, the learned Judge passed the order convicting the appellant and imposed punishments referred to hereinabove.

7. Ms. Rekha H. Kapadia, learned Advocate for the appellant, submitted that since this is an appeal against the order of conviction passed by the learned Judge for the offences punishable under Sections 302, 504 of the IPC as well as under Section 25 (1) (a) of the Arms Act, the appeal requires to be admitted and heard in a full-fledged manner at the time when the matter is listed for final hearing. The learned Advocate submitted that though Record and Proceedings are called for, she had no opportunity to peruse the entire record of the case and, therefore, the appeal be admitted and heard after the same is placed or listed for final hearing. The learned Advocate has submitted that Section 384 of the Code gives ample power to the Appellate Court to summarily dismiss the appeal but when the case is under Section 302 of the IPC or where the death or life imprisonment is awarded, the Court is required to consider the appeal on merits instead of dismissing it summarily. She

placed reliance on the following judgments wherein the aforesaid guidelines have been laid down by the Apex Court:-

(i) Challappa Ramaswami Vs. State of Maharashtra, AIR 1971 SC 64;

(ii) Yasin Gulam Haider Vs. State of Maharashtra, AIR 1980 SC 878; and,

(iii) Dagadu Vs. State of Maharashtra, AIR 1981 SC 1218.

8. The learned Advocate representing the appellant further submitted that in all such cases, where the punishment for life or death sentence is upheld by the High Courts by summarily dismissing the appeals, the Supreme Court has, after quashing and setting aside the said dismissal orders, either remanded the matter to the concerned High Court or heard and disposed of the matter itself and, therefore, considering this practice adopted by the Apex Court, it was appropriate that the present case also, which involves the punishment of life sentence, is not dismissed at the admission stage. Thus, the learned Advocate submitted that taking into account the ratio laid down by the Apex Court in the above mentioned judgments, the appeal requires to be admitted and, thereafter, listed for final hearing. In the alternative, the learned Advocate submitted that even on the perusal of the evidence adduced on the record of the case, the prosecution has not proved the involvement of the appellant in the

commission of offence in a conclusive manner. The learned Judge failed to appreciate the evidence on the record of the case in its true perspective and as there are many discrepancies in the evidence adduced by the prosecution, the appellant requires to be exonerated. The learned Judge ought to have held that as the important witnesses are not examined in the matter, the prosecution could not prove the case against the appellant and, therefore, the appellant is liable to be acquitted. The learned Judge committed egregious error in not appreciating the fact that the victim - Abhal Khima tried to rape the sister of the appellant at night. The learned Judge ought to have held that since the *panch-witnesses* have turned hostile and not supported the prosecution case, the appellant cannot be convicted. The learned Judge ought to have held that since the involvement of the appellant in the commission of offence has not been satisfactorily established by the prosecution, benefit of doubt is required to be given to the appellant.

9. Mr. K. P. Raval, learned Additional Public Prosecutor representing the State, submitted that the prosecution has examined 7 witnesses in order to prove the involvement of the appellant in the commission of offence. The complainant PW-1 Kanabhai Harbham Charna, who has been examined *vide* Exh. 4, PW-3 Salimbhai Ahmedbhai Janej, at Exh. 15 and PW-4 Todiabhai Khimabhai Charna, at Exh. 16, have supported the prosecution version with regard to the

involvement of the accused in the commission of offence. If the entire deposition adduced by the above mentioned witnesses is perused, then it becomes absolutely clear that the deceased and the accused started quarrel on the date of the incident i.e. 28-02-1991 on a flimsy ground of grazing buffaloes in the field. The appellant, who was armed with rifle, lost his temper and fired the bullet in the chest of the deceased and he immediately succumbed to the injuries. The deposition adduced by the above mentioned witnesses is supported by evidence of PW-2 Dr. Dharmeshbhai Harsukhlal Shah, at Exh. 5, the complaint *vide* Exh. 27; and the post-mortem notes *vide* Exh. 10. The *panchnama* with regard to seizure of the clothes, the inquest *panchnama,* the discovery *panchnama* and the FSL report also lend necessary corroboration to the prosecution case indicating the involvement of the appellant in the commission of offence. The learned Additional Public Prosecutor submitted that taking into consideration the entire evidence on record of the case, the prosecution has successfully established the involvement of the appellant in the commission of offence and as the entire link connecting the appellant with the commission of offence has been established by adducing cogent and convincing evidence, the order of sentence passed by the learned Judge requires to be upheld and the appeal preferred by the appellant be dismissed.

10. This Court has heard Ms. Rekha H. Kapadia,

learned Advocate for the appellant-accused, and Mr. K. P. Raval, learned Additional Public Prosecutor for the respondent-State at length and in great detail. This court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

11. We have carefully considered the oral deposition and the documentary evidence relied upon by the prosecution before the Trial Court as well as before this Court at the time of hearing of the appeal. PW-2 Dr. Dharmeshbhai Harsukhlal Shah has been examined *vide* Exh. 5. He had performed the post-mortem of the dead body of the deceased Abhal. He has narrated the internal injuries as well as external injuries sustained by the deceased. As per the opinion given by PW-5 Dr. Dharmeshbhai Harsukhlal Shah, the cause of the death was due to the injuries sustained in the heart and lung with fire-arm. The internal and external injuries were sufficient in the ordinary course of nature to cause the death of the deceased. The complaint produced *vide* Exh. 27 was given by PW-1 Kanabhai Harbham Charna. In the complaint, it has elaborately been narrated as to how the quarrel had taken place between the deceased and the accused in the field where the deceased had gone to graze the buffaloes. The complainant has further mentioned in the complaint that due to quarrel ensued between the deceased and the accused, the accused

lost temper. The accused was armed with rifle and he fired the bullet in the chest of the deceased, who ultimately succumbed to the injuries. The complaint is corroborated by the deposition of the complainant *vide* Exh. 4. The deposition given by the complainant is corroborated by the discovery *panchnama* at Exh. 24 and the FSL report *vide* Exh. 32. The complainant is the sole eye-witness in the present case. He had seen the entire incident and there is no reason to disbelieve or discard his version. The complainant had no axe to grind against the appellant so as to falsely implicate him in the commission offence and, therefore, we do not see any reason to discard the evidence of the appellant which is supported by other documentary evidence which we have discussed hereinabove. Further, the deposition given by PW-2 Dr. Dharmeshbhai Harsukhlal Shah *vide* Exh. 5 supports the prosecution story with regard to the serious injury which was caused to the deceased by the accused.

12. It has been strenuously contended by the learned Advocate representing the appellant that the *panch-witnesses* have turned hostile and not supported the prosecution case. Considering the recent decision of our High Court in **Vahaji Ravaji Thakore And Another Vs. State of Gujarat, 2003 (3) GLH 283**, even if the *panch-witnesses* have turned hostile, the case of the prosecution would not become weak if other witnesses have supported the prosecution case.

13. The deposition given by PW-3 Salimbhai Ahmedbhai Jenaj at Exh. 15, PW-4 Todiabhai Khimabhai Charna at Exh. 16; PW-5 Naranbhai Laghabhai Dodiya at Exh. 21; and PW-6 Mavjibhai Becharbhai Rajput at Exh. 25 support the version given by the complainant. *Panch-witness* PW-5 Naranbhai Laghabhai Dodiya, who has been examined *vide* Exh. 21, is the *panch-witness* in whose presence the accused had shown the rifle and the *panchnama* in that regard was prepared. Thus, the deposition given by PW-5 Naranbhai Laghabhai Dodiya, if perused along with the *panchnama* with regard to the discovery of the weapon, it provides very important link connecting the appellant with the commission of offence. PW-7 Bachubhai Jivbhai Ninama, examined *vide* Exh. 26, had carried out investigation in the most meticulous manner. As per his deposition, the complaint, which was given by the complainant, was recorded. Thereafter, the statements from the neighbourhood were recorded. The *panchnama,* the recovery of the clothes and the discovery *panchnama*, etc. were prepared. The *muddamal* article seized from the scene of offence was sent to FSL for the purpose of detailed analysis and on receipt of the report of the FSL, the charge-sheet was filed against the appellant.

14. Thus, taking into account the entire deposition adduced by the prosecution and the documentary evidence, the prosecution, in our view, has established the involvement of the appellant in the commission of offence. The appellant, who was

armed with rifle, fired bullet in the chest of the deceased and the deceased died on the spot.

15. We have considered the judgments cited by the learned Advocate on behalf of the appellant but since we have called for the entire record of the case and perused the oral deposition and the documentary evidence on which the prosecution has placed reliance during the Trial Court, we do not see any reason to interfere with the order passed by the learned Judge. The learned Advocate representing the appellant was given ample opportunity to go through the entire evidence after the Record and Proceedings were called for. However, instead of pointing out any infirmity, she has pleaded that she had no opportunity to peruse the entire record of the case. We have considered the entire evidence on the record of the case. We find that this is not a case where any arguable point is involved nor a case where the evidence is inconsistent or contradictory. The evidence adduced by the prosecution is cogent, reliable and creditworthy on the face of it that it is just unassailable.

16. In view of the foregoing discussion, the appeal, which is devoid of merits, can be summarily dismissed in view of the judgment rendered in **Dagadu Vs. State of Maharashtra** *(supra)*. Thus, the appeal preferred by the appellant, in our view, does not call for any interference and the same is liable to be dismissed at the admission stage. We, therefore,

hereby upheld the order passed by the learned Judge and pass the following order:

O R D E R

The appeal is dismissed.

[R. P. DHOLAKIA, J.]

[H. B. ANTANI, J.]

/shamnath